No. 2888

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TAKAO OZAWA,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

Upon Appeal from the United States District Court of the Territory of Hawaii.

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FACTS.

This case was brought here from the District Court of Hawaii on appeal from a decree denying the petition for citizenship of appellant, Takao Ozawa.

The record discloses that appellant is of the Japanese race and born in Japan. There was only one question raised and decided in the Court below—Was the appellant eligible to citizenship under our naturalization laws, he being of the Japanese race and born in Japan?

The Court, in a very able and exhaustive opinion upon the interpretation of our naturalization laws held that he was not; that a native of Japan was not

qualified for citizenship under the Revised Statutes, Section 2169.

The record discloses that there were other material grounds in which the Court could have denied the said appellant's petition and the Government now urges that these grounds be considered by this Court for, if the theory upon which the lower Court based its decree is wrong, the Appellate Court will affirm the decree of the trial court if it finds in the record any reason which it considers sound, even though the district judge may have rejected that reason and rested his decree on some other ground.

Smiley vs. *Barker,* 83 Fed. 687
Baker vs. *Kaiser,* 126 Fed. 319
Dean vs. *Davis,* 212 Fed. 88.

The record shows that appellant filed Declaration of Intention on the first day of August, 1902 (Trans. p. 4) and filed his petition to be admitted a citizen of the United States October 16, 1914 (Trans. p. 9). It will be noted that over twelve years had expired between the filing of his first and last papers and over seven years from the time the Act of June 29, 1906 (34th Stat. Part. 1, p. 596) went into effect, to the filing of his petition for citizenship, or his last papers, as they are frequently called.

Sub-section 2 of Section 4 of the Act of June 1906 reads in part:

> "Not less than two years nor more than seven years after he has made such Declaration of Intention, he shall make and file, in duplicate,

> a petition in writing, signed by the applicant in his own handwriting and duly verified, in which petition such applicant shall state his full name, his place of residence, etc."

The Courts have frequently held that this section of the statute is mandatory and if citizenship is granted, when not in compliance with this section, that it is illegally procured and should be set aside. It has been argued that the law of June 29, 1906, is not applicable to those Declarations of Intentions that were made prior to the passage of the Act, but this is not the construction of the law in the decisions of the higher Courts.

The case of *Yunghauss* vs. *U. S.,* 218 Fed. p. 169, Circuit Court of Appeals for the 2nd Circuit, said:

> "A declaration made prior to the Act of 1906 is valid, no matter how long prior thereto it may have been made, but after date of the passage of that Act the person who made the declaration has no superior rights to one who declares thereafter. In both cases action must be taken within the seven years. It seems to us that this is what Congress intended. In effect the Act says to the alien who has made his declaration prior to 1906:
>
> > 'Your declaration is in all respects valid, but if you wish to become a citizen you cannot delay your application for a period of over seven years from the passage of the Act.'
>
> The cases sustaining this view are
> *In re Wehrli* (D. C.) 157 Fed. 938,

In re Goldstein (D. C.) 211 Fed. 163,

In re Harmen vs. *U. S.* 223 Fed. 425.

> The opposing view is clearly stated by Judge Orr in *Eichhorst* vs. *Lindsey* (D. C.) 209 Fed. 708, and by Judge Maxey in *Re Anderson* (D. C.) 214 Fed. 662."

The case Eichorst vs. Lindsey, referred to above as opposing the views here taken by the Government, and against the views of the Circuit Court of Appeals of the First and Second Circuits, was decided by Judge Orr of the United States District Court. The same question came before him in the case of *U. S.* vs. *Lengyel,* 220 Fed. 724, in which the Court said:

> "This court has already expressed its views against such a construction of the act in the case of *Eichhorst* vs. *Lindsey,* 209 Fed. 708, resting more particularly upon the fundamental principle that an act of a legislative body should not be construed as retroactive, unless the language employed expresses a contrary intention in unequivocal terms."

It would seem that the holding of the Supreme Court in the case of *Johannessen vs. U. S.* 225 U. S. 243, relative to the same subject pertaining to Section 15 of the same act, would warrant the same construction upon paragraphs 1 and 2 of Section 4 of the Act.

In a very recent case, *United States of America* vs. *Solomon Louis Ginsberg,* the Supreme Court said, speaking by Mr. Justice McReynolds:

"No alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the Government may challenge it as provided in section fifteen and demand its cancellation unless issued in accordance with such requirements. If procured when prescribed qualifications have no existence in fact it is illegally procured; a manifest mistake by the judge cannot supply these nor render their existence nonessential."

Returning now to the issue made and determined in the lower Court, as to whether the applicant is a white person within the purview of Section 2169 R. S., which reads as follows:

"The provisions of this Title (Naturalization) shall apply to aliens being free white persons and to aliens of African nativity and to persons of African descent.

The limiting words 'free white persons' were used in the first naturalization law passed in this country, approved March 6, 1790 (U. S. Stat. L., Vol. 1, pp. 103 and 104), and with the exception of the period from 1873 to 1875, have been continued in the various statutes passed respecting naturalization. (The excepted period will be referred to later on in this brief.)

To ascertain the true construction of the term 'white persons' it is first necessary to refer to the reason for their adoption, the period and conditions prompting them, the reason for their subsequent retention, and thereafter to dispose of the question of whether ethnology, anthropol-

ogy, and the words 'Caucasian' and 'Aryan' are pertinent to the issue.

Every statute must be construed with reference to the object intended to be accomplished by it. 35 Cyc. 1106.

The great fundamental rule in construing statutes is to ascertain and give effect to the intention of the legislature. 36 Cyc. 1106.

A statute must be construed with reference to the time of the passage thereof, or with reference to its going into effect. That meaning must be given to words which they had at the date of the act, and descriptive matter therein must refer to things as they existed at the time of its passage. 26 Amer. & Eng. Enc. Law, 611.

A thing within the intention of the legislature in framing a statute is often as much within the statute as if it were within the letter. *Rigney* vs. *Plaster* (C. C.) 88 Fed., 689.

The act itself speaks the will of Congress, and this is to be ascertained from the language used. But courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it. *U. S.* vs. *Union P. R. Co.,* 91 U. S., 79;

In accordance with the maxim *'Expressio unius est exclusio alterius',* when a statute enumerates the things upon which it is to operate or forbids certain things it is to be construed as excluding from its effect all those things not expressly mentioned. 36 Cyc. 1122.

In the interpretation of statutes words in common use are to be construed in their natural, plain, and ordinary signification, unless it can be shown that they are used in a technical sense. 36 Cyc. 1114; *In re Saito, supra.*

The term 'white person' must be given its common or popular meaning'. In *re Young* (D C. O.) 198 Fed., 716.

History records that the founders of these United States were from the north of Europe, and were white people in every sense that the words imply. Their customs and usuages are too well known to need elaboration, and suffice it to say that slavery was permitted in some of the colonies, many of these slaves being white men from Europe. The indenture of this class was due to various causes, but it was recognized by the colonists that the disqualifications of these white men might in time be removed. After regaining their freedom these men were permitted a voice in the Government, and in all respects were on a par with the other white freemen. All of the foregoing references to history leads up to the statement that the Congress in 1790 recognized in this class the same type that they themselves were, and in the use of the term 'free white persons' it was this class it was designed to cover. The same did not appeal to them, however, so far as the mixed races and blacks were concerned, and the law was framed solely to retain the control of Government in the white people who had founded the country, or in people, who, like themselves, were from Europe.

At the time the legislation was originally framed it was generally taught that there were four races, the white, yellow, red, and black, and regardless of so-called discoveries and wholly artificial terms used by ethnologists, and incidentally in dispute among them, within comparatively recent times the general teaching has been the same.

After the Thirteenth and Fourteenth Amendments to the Federal Constitution were adopted, the former prohibiting slavery and the latter declaring who shall be citizens, Congress, in the act of July 14, 1870, amended the naturalization laws by adding the following provision: 'That the naturalization laws are hereby extended to aliens of African nativity, and to persons of African descent.' (16 Stats. 256, Sec. 7).

Upon the revision of the statutes in 1873, the words 'free white persons' were omitted, probably through inadvertence. Under the act of February 18, 1875, to correct errors and supply omissions this section of the statute was amended by inserting or restoring these words.

> 'In moving to adopt this amendment in the House it was stated that this omission operated to extend naturalization to all classes of aliens, and especially to Asiatics * * * * The debate which followed proceeded on the assumption that by restoring the word 'white' the Asiatic would be excluded from naturalization, and the motion was adopted with this understanding of its effect.' 3 Cong. Rec. pt. 2 p. 1081. In re Saito, 62 Fed., 187.

Note particularly the words '*African nativity*' and '*African descent.*' They no more aptly describe the negro than 'white' does to the European, and yet we know that negroes alone were intended. That leaves outside the pale of eligibles to American citizenship under its naturalization laws the Asiatics, not by direct legislation as in the case of Indians, but by necessary inference from the fact that whites and blacks are alone given the benefit of our naturalization laws. In other words, the term 'white' as used by 'the fathers' was a convenient general designation that would sufficiently describe Europeans. Europeans were most nearly allied of all races to those who established this free government, for which reason there was less danger to the interests established by incorporating into the body politics of Europeans than would result from the introduction of people who were more remote, not simply in their origin or in the tinting of their complexion, but in their ideals and standards, from those for which the colonists had made such sacrifices, and had incurred such risks.

If ethnology were the true test under section 2169 R. S., of an applicant's admissibility to citizenship it is but proper to state that the Court would be confronted with the question of what school of ethnology or what so-called expert's views it should take. The disputes and changes among the ethnologists themselves are too well known to comment upon and their classifications in many instances, if accepted as the test would bar from American citizenship peoples from Europe who to-day are accepted as 'white persons'

and admitted by the courts. The so-called Finns are generally classed by ethnologists as a part of the Yellow race. Whatever the origin of these peoples, their admission to citizenship, and it is no inconsiderable amount, has never been opposed for the reason that their customs, ideals and standards, and characteristics, so closely conform to those of the founders of this country, whether the cause be their blending with new peoples or whatever it may be, that they are considered as desirable acquisitions and embraced within the term 'white persons'.

If anthropology were to have a bearing on the question the courts would always be confronted with the necessity for differentiating between those inhabitants of India who call themselves Hindus, Parsees, Brahmans, Sikhs, and other natives of India or so-called Hindus with whom they have been living and marrying during the past twelve hundred years, or to call upon an anthropological expert to assist. The tides of immigration which have swept back and forth across the continents of Europe and Asia have to a large extent altered racial characteristics, due to intermarriage, climatic conditions and other causes, and have in many instances almost totally obliterated the original contours and strains.

Judge Thompson rendered an opinion on September 24, 1912 (198 Fed., 688) in the case of *In re Alverto,* holding that the petitioner, a native of the Philippines, whose paternal grandfather was a Spaniard and who married a native woman, the petitioner's father, who was born in

the Philippines also having married a native Filipino woman, could not be admitted to citizenship because not within the provisions of Section 2169 R. S., and dismissed the application.

The simpler and better course, supported by decisions and in the interests of the welfare of this country, would be served if the question of color and racial characteristics were disregarded and the demarcation went simply to the question of whether the alien is of that class contemplated by Congress, to wit, the Europeans who were furnishing the sinews which have resulted in the progress and advancement of this nation.

The question of color is regarded as inconsequential, because if the term 'white person' were to be construed with regard to this alone, a person of lily white color, regardless of any other fact would have a decided advantage over a decided brunette however much the latter might be within the terms of the act. If the question of whether the birthplace of the forefathers of this applicant for centuries back is to control, it might well be asked whether the term 'white person' could be limited to any person seeking American citizenship. It is not an individual that the Court has to deal with in this instance, but with a class, 'Japanese', which from time almost immemorial has lived under totally different ideals, standards, customs, and usuages from those of the framers of this legislation and those of us to whom the term is generally accepted as applicable. It is inconceivable that Congress should have intended to open the doors of citizenship to Asiatics, who for the reasons

referred to above, could never, should they come to this country, be assimilated into the body politic, and with regard to whom ethnologists are wholly at variance.

The words 'Caucasian' and 'Aryan' are treated of in *Ex parte Shahid,* 205 Fed., 812, so thoroughly that they are set forth below as sufficient for the purpose of covering this phase of the question at issue. In this case the following authorities were examined by the Court:

In re Ah Yup, 5 Sawy. 155 (Fed. Cas. 104)

In re Camille (C. C.), 6 Sawy. 541 (6 Fed., 256)

In re Gee Hop (D. C.), 71 Fed. 274

In re Rodriguez (D. C.), 81 Fed. 337

In re Kumagai (D. C.), 163 Fed. 922

In re Knight (D. C.), 171 Fed. 299

In re Najour (C. C.), 174 Fed. 735

In re Halladjian (C. C.), 174 Fed. 834

In re Mudarri (C. C.), 176 Fed. 465

Bessho vs. *U. S.* (C. C. A.), 178 Fed. 245 (101 C. C. A.)

In re Ellis (D. C.), 179 Fed. 1002

In re Balsara (C. C.), 171 Fed. 294 (CCA. 180 Fed. 694).

The Court then states (at page 814), "After considering them all in an attempt to evolve, if possible, some definite rule for judicial decision, the conclusion that this Court has arrived

at is as follows: That the meaning of free white persons is to be such as would naturally have been given it when used in the first naturalization act of 1790. Under such interpretation it would mean by the term 'free white persons' all persons belonging to the European races, then commonly counted as white, and their descendants. It would not mean a 'Caucasian' race, a term generally employed only after the date of the statute and in a most loose and indefinite way.

The term 'Caucasian' obtained much currency in the pro and anti slavery discussions between 1830 and 1860, but later and more discriminating examination and analysis has shown its entire inapplicability as denoting the families or stocks inhabiting Europe and speaking either so-called Aryan or Semitic languages. Nor would 'free white persons' mean an 'Aryan' race, a word of much later coinage, and practically unknown to common usuage in 1790, and one still more indefinite than Caucasian, and which would exclude all Semitics, viz., Jews and Arabians, and also all Europeans, such as Magyars, Finns and Basques, not included in the Aryan family. It would not mean 'Indo-European' races, as sometimes ethnologically at the present day defined as including the present mixed Indo-European, Hindu, Malay, and Dravidian, inhabitants of East India and Ceylon; nor the mixed Indo-European, Dravidian, Semitic, and Mongolian peoples who inhabit Persia. It would mean only such persons as were in 1790 known as White Europeans, with their descendants, including as their descendants their de-

scendants in other countries to which they have emigrated, such as the descendants of the English in Africa or Australia, or the French and Germans and Russians in other countries. At page 815 the Court continues: 'In 1790 the distinctions of race were not so well known or carefully drawn as they are today. At that date all Europeans were commonly classed as the white race, and the term 'white' person in the statute then enacted must be construed accordingly. To hold that a pure-blooded Chinaman, because born in England or France, was included within the term, would be as far fetched as to hold that a pure-blooded Englishman, Irishman, or German born in China was excluded.'

The modern Bengalee or Parsee or Persian may be partly of Indo-European descent. The ancient Zend and Vedic writings apparently emanate from a fair-complexioned, light-haired, if not blue-eyed people. The speakers of Sandcrit, who conquered Hindoostan, or the speakers of the ancient Zend, who conquered Persia, were probably in that category. But in India the conqueror seems to have been soon swallowed up in an enormously preponderant brown or black people of different race, and in Persia the same result followed in a degree afterwards accentuated by the terrible Mongolian or Tartar invasions which destroyed whole communities, replacing them by pure Mongolians. In most Asiatic countries the governing or controlling element or strain is apparently that of a dark-colored people, not of European descent. * * *

In the face of all these difficulties it is safest to follow the reasonable construction of the stat-

ute as it would appear to have been intended at the time of its passage, and understand it as restricting the words 'free white persons' to mean persons as then understood to be of European habitancy or descent.

Continuing on page 816, the Court says: 'The geographical interpretation that 'free white persons' means person of European habitancy and descent is at least capable of uniform application, and gives to the statute a construction that avoids the uncertainties of shades of color and invidious discriminations as to the race of individuals.''

Chancellor Kent as early as 1827 (2 Kent Comm. 72) stated that it might well be doubted whether the copper colored natives of America or the yellow or tawny races of the Asiatics are white persons within the purview of the law.

This view seems to be fully in accord with the following cases, some of the applicants being of the same race as the appellant:

In re Saito, 62 Fed. 126,

In re Dow, 213 Fed. 355,

In re Camille, 6 Fed. 256,

In re Takuji Yamaslutu, 70 Pac. 482,

In re Young, 195 Fed. 645,

In re Young, 198 Fed. 715.

It is argued by the appellant's counsel that the Act of June 29, 1906, is complete in itself and is not limited or restricted by Section 2169 of Title XXX R. S.

The Act of June 29, 1906, is not complete except in so far as is expressed by its terms. It provides for "a uniform *rule* for the naturalization of aliens throughout the United States" and sets forth the "manner" in which an alien may become a citizen of the United States, but it does not include or purport to include all the laws of the United States relating to the naturalization of aliens and in that sense is not a complete Act of Naturalization. It did not supercede and was not intended to supercede any of the laws relating to the naturalization of aliens except those set forth in Section 26 of said Act, including all acts or parts of acts inconsistent with or repugnant to said Act or any portion thereof.

This seems to be the construction of the Court in the case in *re Alverto,* 198 Fed. p. 690, in which the Court said:

> "The Naturalization Act of 1906 expressly repealed many of the then existing provisions of law in relation to naturalization. Section 2169 was not repealed, and, if Congress had not intended its provisions to apply to section 30 of the Act of 1906, such intention would naturally appear in the Act. As it has not excepted section 30 of the Act from the provisions of Section 2169, Revised Statutes, the latter section must be held to be an applicable provision of the Naturalization Laws."

Section 2169 sets forth the races who may be naturalized and the Act of June 29, 1906, sets forth the manner, conditions and procedure under which the

races who may be naturalized may secure admission to citizenship. Had it been intended to make the Act of June 29, 1906, a complete Act of Naturalization, it is fair to assume that the whole of Title XXX of the Revised Statutes would have been repealed, and such sections thereof as it was desired to retain would have been reenacted as a part of said Act. As Congress repealed only certain sections of Title XXX it must be presumed that it was intended to leave the sections of Title XXX which were not repealed as a part of the Natrualization Law in as full force and effect as before the enactment of the Act of June 29, 1906.

The Act of March 26, 1790, U. S. Stats. at L., Vol. 1, pp. 103, 104, the first act providing for the naturalization of aliens, provided for the admission to citizenship only of "any alien being a free white person".

In the Act of June 29, 1895, Vol. 1, pp. 414, 415 U. S. Stats. at L., the second Naturalization Act, it was again provided "that any alien being a free white person may be admitted to become a citizen of the United States or any of them on the following conditions and not otherwise * * *". This language was substantially repeated in the Act of April 14, 1802, Vol. 2, pp. 153-155, U. S. Stats. at L., in the Act of May 26, 1824, U. S. Stats. at L., Vol. 4, p. 69 and in the Act of May 24, 1828, U. S. Stats. at L., Vol. 4, pp. 310, 311.

In no Act of Congress was any provision made for the naturalization of any other person than "an alien being a free white person" until Congress provided in Section 7 of the Act of July 14, 1870, U. S. Stats. at L., Vol. 16, p. 256 "That the naturalization laws are hereby extended to aliens of African nativity and to persons of African descent".

In the first edition of the Revised Statutes 1873 all naturalization laws in effect at the date of the compilation were placed under Title XXX and Section 2169 thereof read: "The provisions of this Title shall apply to aliens of African nativity and to persons of African descent". This was evidently an error which was promptly corrected by the Act of February 18, 1875, Vol. 18, p. 318 U. S. Stats. at L., when said Section 2169 was amended by inserting in the first line after the word "aliens" the words "being free white persons and to aliens", thus making Section 2169 read as incorporated in the Revised Statutes of 1878: "Inasmuch as no alien may be naturalized except under such conditions and limitations as may have been provided by Congress and as Congress from the very first naturalization act passed in 1790 down through many succeeding acts until the year 1870 granted the privilege of naturalization only to aliens being free white persons" and then provided in Section 7 of the Act of July 1870 "that the Naturalization Laws are hereby extended to aliens of African nativity and to persons of African descent". The law undoubtedly then was that no person except a free white person, a person of Afri-

can nativity or African descent could be admitted to citizenship.

It was only for convenience that all the naturalization laws were assembled under one title in the Revised Statutes and Section 2169 was made to read "The provisions of this title shall apply to aliens being free white persons and to aliens of African nativity and to persons of African descent."

Before the revision as afterwards only the persons named in Section 2169 might be admitted to citizenship. It is apparent that as all naturalization laws were included in Title XXX, in the Revision the phraseology adopted in Section 2169 was merely a convenient form of stating the then existing law and that there was no purpose to change the then existing law. It follows, therefore, that Section 2169 was merely declarative of existing law which placed a limitation, as stated, on persons who might be naturalized. Since, when adopted, said section limited the naturalization of aliens to the classes of persons named therein, there could be no enlargement of the classes who might be naturalized except by subsequent enactment of Congress, and Congress has never seen fit to make such enactment.

As in 1878 the naturalization of aliens was restricted to the classes named in Section 2169, there being no naturalization law not included in Title XXX, we cannot assume that the classes who may be naturalized have been enlarged by the passage of subsequent naturalization laws which do not mention

the subject but provide for a general rule of naturalization, the manner of naturalization and the procedure, in detail.

In providing under the Act of June 26, 1906, that *an* alien may be naturalized in the following manner and not otherwise, it cannot be held to mean that *any* alien may be so naturalized, but only an alien who, under existing law may be naturalized in the manner and under the conditions only as stated. If it had been intended to enlarge the classes of persons who might be naturalized under such act, it is fair to presume that Congress would have said "*any* alien may be naturalized in the following manner and not otherwise," and this would have been followed by a repeal of Section 2169.

The Act of June 29, 1906, did not touch or purport to touch the question of what classes may be naturalized, for that question was covered by Section 2169 and the fact that said section was not repealed as were certain other sections of Title XXX conclusively indicates that there was no intent to change the existing law as to who may be naturalized.

The Courts have recognized the fact that Section 2169 is not only a limitation on the unrepealed sections of Title XXX, but on all subsequent naturalization acts by numerous decisions.

The so-called Navy Act of July 26, 1894, was passed after the revision of 1878 and was never made a part of Title XXX, and yet in numerous cases the

Courts have held that applicants under said Act are subject to the restrictions of Section 2169.

Besso vs. *U. S.,* 178 Fed. 245,

In Re Alverto, 198 Fed. 688,

U. S. vs. *Balsara,* 180 Fed. 694.

In conclusion we wish to say that the Government neither palliates nor denies the noble characteristics of the Japanese race as portrayed by appellant's counsels but we respectfully submit that the argument would be more appropriate to the legislative department for its consideration than the judicial, as it was said in the case of *U. S.* vs. *Ginsberg,* referred to above, relative to the naturalization law:

> "Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare."

Respectfully submitted,

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